Amanah Merchant Bank Bhd v Lim Tow Choon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-172-93
JEMURI SERJAN CJ (BORNEO), PEH SWEE CHIN AND MOHAMED DZAIDDIN SCJJ
18 NOVEMBER 1993

Contract *— Construction of terms of contract — Service of notice of demand — Notice to be given by post — Notice sent by AR registered post — Non-return of AR card — Whether service effective — Whether plaintiff had assumed additional burden of obtaining duly acknowledged AR card in order to prove service*

Word and Phrases *— 'Post'*

Word and Phrases *— 'Shall be deemed'*

The respondent was sued under a guarantee following the default of the principal borrowers to whom the appellant had granted a borrowing facility. The appellant's solicitors had sent a notice by AR registered post to the last known address of the respondent, demanding payment of the amount owing. However, the AR card was not returned and the respondent denied that the notice had been properly served. The material clause (cl 17) in the guarantee stated that 'any notice may be served ... by sending the same through the post ... to the last known place of address of the person to be served and ... shall be deemed to be served on the day following that on which it is posted'. The trial judge held that the burden was on the appellant to prove that the notice had been received by the respondent and in this case, service could be said to have been effected only upon the return of the acknowledged AR card. [See [1993] 2 MLJ 241.] The appellant has appealed.

The central issue in the appeal was whether, on the proper construction of cl 17 of the said guarantee, it could be held that it was sufficient to prove that the notice of demand was duly served on the respondent by sending the same through the post in an envelope addressed to the last known address of the respondent, and that it was irrelevant whether it was sent by registered post or by AR registered post or, as was held by the trial judge, that the deeming provision only applied to a notice sent by ordinary post and that since the appellant had taken on the added responsibility of sending the notice by AR registered post, it was only upon the return of the AR card with an acknowledgement of receipt that the said notice had been effectively served on the respondent.

Held, allowing the appeal:

(1) In construing the words of the guarantee, the judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances. The judge ought to have given the word 'post' its ordinary and natural

meaning and, in the context of cl 17, should not have made a distinction between ordinary post and AR registered post. A

(2) On the proper construction of cl 17, since any notice could be served by post, addressed to the last known address of the addressee, the deeming provision applied to the notice, whether or not it was sent by AR registered post. B

(3) Once it was established that the notice of demand was sent through the post in an envelope addressed to the last known place of address of the defendant, cl 17 applied. It was not necessary for the appellant to show that the AR card had been returned duly acknowledged for there to have been effective service of the notice of demand. C

(4) The words 'shall be deemed' in cl 17 mean 'shall be regarded as'.

[Bahasa Malaysia summary

Responden telah didakwa atas suatu jaminan selepas keingkaran peminjam utama yang telah diberi kemudahan pinjaman oleh perayu. D Peguamcara perayu telah menghantar suatu notis melalui pos berdaftar AR kepada alamat responden yang terakhir diketahui, menuntut bayaran jumlah wang yang terhutang. Walau bagaimanapun, kad AR itu tidak dikembalikan dan responden telah menafikan bahawa notis itu disampaikan dengan sempurna. Fasal yang mustahak (fasal 17) E dalam jaminan itu menyatakan bahawa, 'sebarang notis boleh disampaikan ... dengan menghantarnya melalui pos ... kepada tempat alamat orang yang hendak disampaikannya dan ... hendaklah dianggap disampaikan sehari selepas ia diposkan'. Hakim perbicaraan telah memutuskan bahawa beban terletak atas perayu untuk membuktikan bahawa notis itu telah diterima oleh responden dan di dalam kes ini, F penyampaian boleh dikatakan berkesan hanya atas pengembalian kad AR yang mengandungi perakuan penerimaan. [Lihat [1993] 2 MLJ 241.] Perayu telah membuat rayuan.

Isu utama di dalam rayuan itu adalah sama ada, menurut pentafsiran yang wajar fasal 17 jaminan itu, boleh diputuskan bahawa notis G jaminan itu telah disampaikan seperti yang sepatutnya pada responden dengan menghantar notis itu melalui pos di dalam sampul surat yang dialamatkan kepada alamat responden yang terakhir diketahui, dan bahawa adalah tidak penting sama ada ianya dihantar melalui pos biasa atau pos berdaftar atau, seperti yang diputuskan oleh hakim perbicaraan itu, bahawa peruntukan itu hanya terpakai kepada suatu H notis yang yang dihantar melalui pos biasa dan oleh kerana defendan telah memikul tanggungjawab yang lebih dengan menghantar notis itu melalui pos biasa, hanyalah dengan pemulangan kad AR itu bersama dengan pengakuan, penerimaan notis itu disampaikan ke atas responden dengan sempurna.

I

Diputuskan, membenarkan rayuan itu:

(1) Dalam mentafsirkan perkataan-perkataan di dalam jaminan itu, hakim seharusnya mengunakan pendekatan yang longgar dengan

memberi tafsiran yang munasabah kepada perkataan-perkataan itu, setelah mempertimbangkan keadaan sekelilingnya. Hakim sepatutnya memberikan perkataan 'pos' maknanya yang biasa dan wajar dan, dalam konteks fasal 17, tidak seharusnya membuat perbezaan di antara pos biasa dan pos AR berdaftar.

(2) Mengikut tafsiran fasal 17 yang sewajarnya, oleh kerana sebarang notis boleh disampaikan melalui pos kepada alamat penerima yang terakhir diketahui, peruntukan mengenai anggapan itu terpakai kepada notis itu, sama ada ia dikirim melalui pos berdaftar AR atau tidak.

(3) Sebaik sahaja notis itu dibuktikan telah dihantar melalui pos dalam sampul surat yang dialamatkan kepada alamat defendan yang terakhir diketahui, fasal 17 terpakai. Defendan tidak perlu menunjukkan bahawa kad AR itu telah dikembalikan dengan perakuan penerimaan seperti yang sepatutnya supaya penyampaian notis tuntutan itu berkesan.

(4) Perkataan 'shall be deemed' di dalam fasal 17 itu bermakna ' shall be regarded as'.]

Cases referred to

1 *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47 (not folld)
2 *Cooperative Central Bank Ltd v Dato' Seri Mohd Adib Mohd Adam & Ors* (unreported) (folld)
3 *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 (not folld)
4 *Kong Ming Bank Bhd v Leong Ho Yuen* [1982] 2 MLJ 111 (folld)
5 *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16 (folld)
6 *Lloyd's v Harper* (1880) 16 Ch D 290 (folld)
7 *TO Supplies (London) LD v Jerry Creighton LD* [1952] 1 KB 42; [1951] 2 All ER 992 (folld)
8 *Canadian Imperial Bank of Commerce v Haley* (1979) 100 DLR (3d) 470 (folld)
9 *R v Westminster Unions Assessment Committee, ex p Woodward & Sons* [1917] 1 KB 832 (folld)

Appeal from: Civil Suit No D2–23–1218–88 (High Court, Kuala Lumpur)

Benjamin John Dawson (*Wong Kok Leong* with him) (*Nik Hussain & Partners*) for the appellant.

TJ Su (*Teh Meng Teik* with him) (*Cheah Teh & Su*) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This appeal concerns an interpretation of a clause in a letter of guarantee ('the

said guarantee') dealing with the service of a notice of demand. The material clause in the guarantee states as follows:

> 17 Any notice may be served on the undersigned or his/their executors, administrators or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

The respondent, who was the second defendant in the action, was sued under the said guarantee dated 3 October 1984 following the default of the principal borrowers, whereby, as a director, he guaranteed to pay the appellant bank all sums due and owing under a revolving bankers' acceptance facility granted by the bank to the principal borrowers. His liability was, however, limited to RM2m. Being an 'on demand' guarantee, the appellant's solicitors sent him a notice dated 4 March 1988 by AR registered post to his last known address, demanding payment of the amount owing. On 19 May 1988, the bank issued a writ against the guarantors, which was followed by the filing of the statement of claim. By para 4 of the amended statement of claim, the bank alleged that a demand for payment was made to the respondent by the solicitors' letter of 4 March 1988. The respondent denied this allegation in para 12 of the amended defence and put the appellant to strict proof thereof. At the trial of the action, which was confined to the respondent, the learned trial judge held that there was an issue to be tried on the notice of demand. She stated that the burden was on the bank to prove that the said notice had been sent to and received by the respondent. Hence, the appellant adduced evidence showing that the notice, which was sent by AR registered post, was properly addressed, prepaid and delivered to the post office and acknowledged receipt by the postal authority on 9 March 1988. The appellant also established that the respondent resided and continued to reside at the same address stated in the said guarantee at the date when the notice of demand was sent. In the circumstances, it was contended on behalf of the appellant that by the deeming provision of cl 17, the said notice of demand was received by the respondent on 10 March 1988, a day after the postal authority acknowledged receipt of the said notice for service despite the non-return of the AR card. The learned judge rejected the above argument.

In dismissing the bank's claim on the ground of non-effective service of the notice of demand, and therefore no cause of action having been established against the respondent, the learned judge gave the following reasons:

(i) that the deeming provision of cl 17 was only good for notices sent by ordinary post; and

(ii) that on the facts of the case before her, it was only upon the return of the AR card with the acknowledgement of receipt that it could truly be said that the letter of demand had been effectively served on the guarantor. Anything short of that could never amount to the letter of demand having been served on the guarantor where posting was done through AR registered post. (See [1993] 2 MLJ 241 at pp 247G–248F).

A We observe that the learned judge had noted in her judgment that a number of authorities were cited before her as to the meaning of the word 'post', the difference between ordinary post and registered post, as well as the presumption of receipt. She seemed to find them irrelevant as she was concerned only with the AR registered post. So, in dealing with the issue of service of the notice of demand under cl 17, she proceeded to examine the B authorities which dealt with the issue of notices sent by AR registered post as opposed to ordinary post. The first case which she considered was her own decision in *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors*,[1] which she found to be on all fours with the present case. In that case, cl 8 of the guarantee stipulated, inter alia, that service of the notice of demand C may be effected by personal service or through ordinary post. Solicitors for the bank sent the notices of demand to the guarantors by AR registered post and the AR cards were subsequently returned with the endorsement 'kembali tidak boleh dituntut'. The learned judge held that by choosing to send the notices by AR registered post, the bank had varied cl 8 and, by so doing, the bank had burdened itself with the added responsibility of seeing that the AR D cards were returned duly acknowledged by the guarantors. As the AR cards had been returned with the aforementioned endorsements, the learned judge held that there was no effective service of the notices of demand on the guarantors.

In *Cooperative Central Bank Ltd v Dato' Seri Mohd Adib Mohd Adam & Ors*,[2] according to the relevant term in the loan agreement, a letter of E demand was deemed to have been served if sent by registered post to the address given in the loan agreement, notwithstanding that it be undelivered or returned undelivered. The bank chose to send the letter of demand by AR registered post where the retour card was not returned. It was argued that since the deeming provision was for letters of demand to be sent by F registered post, sending a letter by AR registered post was ineffective. VC George J rejected this contention and held that based on the principle that 'the greater' would include 'the lesser', and that the AR registered post was 'a more sophisticated version of the ordinary registered post', sending the letter of demand by AR registered post amounted to sending it by G registered post within the meaning of the deeming provision in the loan agreement. In distinguishing the *Cooperative Bank*'s case,[2] the learned judge seemed to have perceived the principle adopted by VC George J differently in the present case. She accepted that sending a letter by AR registered post was greater and not lesser than sending it by ordinary post. However, as 'the postman must obtain an acknowledgement of receipt of the letter on H the AR card in the case of the former but not in the case of the latter', it seemed to her that only upon the return of the AR card that it could truly be said that the letter of demand had been effectively served on the guarantor.

In *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors*,[3] a notice of demand was sent by AR registered post, contrary to the provision in the I guarantee, which required it to be sent by registered post. The court held, inter alia, that in the absence of the AR card, the letter of demand was not served on one of the guarantors.

In this appeal, the complaint of the appellant was that the learned judge should have decided that the appellant had proved that the notice of

demand dated 4 March 1988 was delivered to the respondent. In this respect, the thrust of Encik Dawson's submission, both in the court below and before us, was that since the notice of demand was correctly addressed, prepaid and delivered to the post office and acknowledged by the postal authority, a presumption arose that the said notice had reached the respondent at the given address and was deemed to have been received by him on the following day, a day after the postal authority acknowledged receipt of the notice for service. It was then for the respondent to rebut this presumption, where, by his absence at the trial, he had failed to do so. Counsel commented that the learned judge seemed to require the appellant to prove that the notice of demand had been effectively served on the respondent by the return of the AR card with the acknowledgement of receipt. Counsel also submitted that the learned trial judge was wrong in holding that the deeming provision in cl 17 was only good for ordinary post.

The central issue in the present appeal is whether, on the proper construction of cl 17 of the said guarantee, it could be held that it is sufficient to prove that the notice of demand was duly served on the respondent by sending the same through the post in an envelope addressed to the last known place of address of the respondent, and that it is irrelevant whether it was sent by registered post or by AR registered post or, as was held by the learned judge, that the deeming provision only applies to a notice sent by ordinary post and that since the appellant had taken on the added responsibility of sending the notice by AR registered post, it was only upon the return of the AR card with an acknowledgement of receipt that the said notice had been effectively served on the respondent. With respect, we do not agree with the finding of the learned judge. In construing the words of the guarantee, in our view, the learned judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances (*Kong Ming Bank Bhd v Leong Ho Yuen*;[4] *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani*,[5] following the judgment of Fry J in *Lloyd's v Harper*[6]). O'Donovan & Phillips, in their treatise on the law of guarantee, *The Modern Contract of Guarantee* (1985), stated at p 145 as follows:

> Thus the guarantee should be given a reasonable, business meaning and should not be construed so as to render the guarantee ineffective or illusory. The weight of authority between this 'liberal' method of construction and the contra proferentem approach taken by Sheppard J in *Scholefield Goodman and Sons Ltd v Gange* (unreported, Supreme Court of New South Wales, 4 December 1979) is almost equally divided. The different views might well be the result of the differing contexts in which the guarantee is given, a more liberal view being taken where the guarantee is given by directors in the context of a major commercial transaction and the contra proferentem view being advanced where the guarantee is given in respect of a consumer transaction. On balance it is considered that the courts will in the future be more likely to interpret guarantees in the same way as any other commercial agreement rather than to apply a strict contra proferentem rule to their construction while, at the same time, acknowledging that guarantees have to be interpreted with reasonable regard for the extent of the guarantor's obligation.

Bearing in mind the above principle, the learned judge ought to have given the word 'post' its ordinary and natural meaning and, in the context of cl 17, should not have made a distinction between ordinary post and AR registered post. In *TO Supplies (London) LD v Jerry Creighton LD*,[7] Devlin J (as he then was) stated at p 45:

> It appears to me that the word 'post' in its ordinary and natural meaning is wide enough to cover both registered and ordinary post, and I do not think that it is possible to limit it to one or the other.
>
> ... A letter which is carried through the post, whether registered or not, is still 'posted' in the ordinary sense, and registration is merely one way of posting a letter.

In the light of the meaning of the word 'post' stated above, it follows that a notice which is sent by post, whether registered or not, is still 'posted' in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by AR registered post would not make any difference since registration is merely one way of sending a letter. It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor. See *Cooperative Central Bank Ltd*[2] and *MBf Finance Bhd*[3] where, in both cases, the notice of demand was required to be sent by registered post. Or there may be instances where a clause in a guarantee may provide the mode of service by prepaid AR registered post. Be that as it may, the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case of AR registered post, to borrow VC George J's words, 'it is just a sophisticated version of the ordinary registered post'.

Therefore, on the proper construction of cl 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from cl 17 cannot justify the court reading those words in cl 17 as was done by the learned judge. In the context of cl 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

On the meaning of the words 'shall be deemed' in cl 17, it would seem clear to us from the authorities that they mean 'shall be regarded as'. There are very few decided cases on the meaning of the word 'deemed' when used in a deed. However, in *Canadian Imperial Bank of Commerce v Haley*,[8] the New Brunswick Supreme Court, Appeal Division, was called upon to decide on the meaning of these words 'shall be deemed' in cl 10 of the guarantee, which reads:

That the guarantor shall make payment to the bank of the amount of the liability of the guarantor forthwith after demand therefor is made in writing and such demand *shall be deemed* to have been effectually made when an envelope containing it addressed to the guarantor at the last address of the guarantor known to the bank is deposited, postage prepaid and registered, in the post office and the liability of the guarantor shall bear interest at the rate of 8%pa from the date of such demand. (Emphasis added.)

In dismissing the bank's claim, the trial judge held that the demand was not effectual because the defendant did not actually receive the demand and he interpreted 'deemed' to mean 'rebuttably presumed'. Hughes CJ, delivering the judgment of the court, stated at p 475 as follows:

With every respect to the learned trial judge's conclusion, I find myself unable to agree with his interpretation of the words 'shall be deemed' in cl 10 of the guarantee. In *Hickey v Stalker et al* [1924] 1 DLR 440, 53 OLR 414 (Ont CA), the meaning of these words, which were used in the Mechanics' and Wage Earners' Lien Act, were brought into issue. It was said by Meredith CJCP, at p 442, that the expression may mean 'deemed conclusively' or 'deemed until the contrary is proved'. Middleton J said at p 444:

> 'It may but does not always mean 'adjudged and determined'. Certainly, when the doing or abstaining from doing a particular thing is to be 'deemed' to have a particular consequence, this is a very natural meaning, though the same result might be attained by attributing to it the meaning 'shall be regarded as'. So, when an appeal which is not set down in time is to be 'deemed to be abandoned', it does not require much imagination to find an intention on the part of the legislature to say that such an appeal shall be regarded as abandoned, and make it the duty of the court to 'adjudge and determine' that it was abandoned. *Re Rodgers and MaFarland* 19 OLR 622.'

The practical necessity for a deeming provision such as that in cl 10 in a form of guarantee used by a bank where personal contact with its guarantors is not always feasible, is readily apparent. In my opinion the words 'shall be deemed' in cl 10 are the equivalent of 'shall be regarded as', and consequently the fact that the defendant did not actually receive the demand, which the bank had sent him pursuant to cl 10, is immaterial and can afford no defence to the action.

In *R v Westminster Unions Assessment Committee, ex p Woodward & Sons*,[9] the appellate division of the King's Bench considered the meaning of the words 'shall be deemed to have been served and received' as used in s 65 of the Valuation (Metropolis) Act 1869, which reads:

All orders and notices under this Act ... shall be in writing or print, or partly in writing and partly in print ... and all orders, notices and documents required ... to be served on or sent to any person or body of persons corporate or unincorporate may be either delivered to such person or the clerk of such body, or left at the usual place of abode of such person or clerk, or at the office of such clerk or body, or (if such abode or office cannot on reasonable inquiry be discovered) at the premises to which the order, notice, or document refers.

They may also be served and sent by post, by a prepaid letter, addressed to such person, or to the office of such body or to their clerk, and, if sent by post, *shall be deemed* to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter

containing the notice was properly addressed and prepaid and put into the post. (Emphasis added.)

Viscount Reading CJ at p 838 said:

> A notice prepaid and addressed as directed by s 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post'. That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact — even something which can be shown not to be a fact. The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post'. In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received.

Although the words 'shall be deemed' in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove service of the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above.

For reasons stated above, in our judgment, on the true construction of cl 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal, and with the consent of the parties, we make no order as to costs. The deposit will, however, be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim